

No. 13,131

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIAM R. DAVENA, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

	Page
A statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this court has jurisdiction to review the judgment in question	1
Statement of the case, presenting the questions involved and the manner in which they are raised	4
Theory of the prosecution	5
Theory of appellant	6
Specification of errors	6
Questions presented in this case	7
Statement of facts	8
Argument	20
Conclusion	30

Table of Authorities Cited

Cases	Pages
Gleekman v. U. S., 85 Fed. (2d) 394.....	22
Tinkoff v. U. S., 86 Fed. (2d) 868	22
United States v. Fenwick (C.C.A. 7th Ct., 1949), 177 Fed. (2d) 488	24, 27

Statutes

18 U.S.C.A., Sec. 3231	3
26 U.S.C.A., Sec. 145(b)	1, 3
28 U.S.C.A., Sec. 1291	3

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**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING THE BASIS UPON WHICH IT IS CONTENDED
THAT THE DISTRICT COURT HAD JURISDICTION AND
THAT THIS COURT HAS JURISDICTION TO REVIEW
THE JUDGMENT IN QUESTION.**

This is an appeal from a judgment against the appellant in the United States District Court for the Northern District of California upon a verdict finding the appellant guilty of violations of 26 U.S.C.A. 145(b) (Income Tax Evasion). The charges are in one indictment containing three counts.

The first count charges that on or about the 15th day of March, 1945, in the Northern District of California, Southern Division, William R. Davena, Jr., late of Benicia, California, who during the calendar

year 1944 was married, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their adjusted gross income for said calendar year was the sum of \$3,475.00 and that the amount of tax due and owing thereon was the sum of \$262.97, whereas, as he then and there well knew, their adjusted gross income for the said calendar year was the sum of \$7,244.92, upon which said adjusted gross income there was owing to the United States of America an income tax of \$1,206.03.

The second count pleaded, in essentially the same language, the same offense for the year 1945, a joint income tax return was filed, the declared net income alleged was \$2,972.87, the declared tax owing was \$253.76, whereas the claimed income was \$6,328.52 and the claimed income tax, \$1,085.26.

The third count was the same for the year 1946, as counts one and two, the declared net income alleged was \$3,620.00, the declared tax, \$240.00 and the claimed actual income was \$14,354.88 and the claimed tax \$3,374.96.

The verdict of the jury was guilty of all three counts. The appellant was sentenced to imprisonment

for a period of thirty months on count one; for imprisonment for thirty months on count two; for imprisonment for 30 months and that he pay a fine to the United States in the sum of \$2,500.00 on count three; that the periods of imprisonment imposed on the defendant on counts two and three commence and run concurrently with the period of imprisonment imposed on the defendant on count one.

The United States District Court for the Northern District of California had jurisdiction under the provisions of 26 U.S.C.A. Sec. 145(b) and 18 U.S.C.A. Sec. 3231.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under the provisions of

28 U.S.C.A., Sec. 1291.

Upon conclusion of the case of the prosecution, defendant moved the Court for a judgment of acquittal upon the grounds of the insufficiency of the evidence, principally, a failure to establish the *corpus delicti* save and except by extrajudicial admissions of the defendant, and an improper application of the so-called "net worth-expenditure" method of proving income tax evasion.

After the verdict and within the time allowed by law appellant moved the Court for a new trial upon all the grounds now urged on this appeal and others. The motion was denied and appellant was sentenced as above stated.

Thereafter appellant duly filed his notice of appeal from said judgment against him within the time prescribed by law.

Thereafter, and within the time prescribed by law, appellant filed and served his designation of the record to be sent up on appeal, and thereafter and within the time prescribed by law, appellant filed and served a statement of points upon which appellant intends to rely on appeal.

Thereafter and within the time prescribed by law and by order of said United States District Court, the record in this case, including the transcript of all testimony and all exhibits separately and directly certified, was filed with the clerk of this Court together with a statement of points to be relied upon on appeal.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

As stated above, appellant was convicted of income tax evasion in wilfully and knowingly filing false and fraudulent individual returns in each of the years 1944, 1945 and 1946.

THEORY OF THE PROSECUTION.

The appellant in all of said years and for many years theretofore had been Chief of Police and Chief of the Fire Department of the City of Benicia, Solano County, California.

It was the contention of the prosecution that the defendant failed to report on his income tax returns a substantial portion of income which he received during the years 1944, 1945 and 1946.

The prosecution in this case relied upon the net worth theory. In order to establish this theory the prosecution relied upon extrajudicial admissions of the defendant. In order to present this theory to the jury the prosecution called a number of witnesses in an attempt to establish that the defendant had certain assets such as bank accounts, an automobile, model trains, guns and a home, and testimony to the effect that he had received certain income from prostitutes and gamblers. The prosecution then, through its agents, attempted to itemize the various items in such a way as to establish that the defendant's net worth was substantially increased during each of the years in question.

Upon the conclusion of plaintiff's case, defendant moved for a judgment of acquittal upon the grounds hereinabove noted. This motion was denied.

THEORY OF APPELLANT.

The evidence of appellant showed:

(1) That the defendant had received a sum of \$5,000.00 prior to the year 1944 from his mother.

(2) That the appellant did not pay a sum of \$7,000.00 or any such sum of money for a home in the calendar year of 1946.

(3) That the model trains in question were worth approximately \$1,500.00 as of December 31, 1943 and not \$500.00.

(4) That appellee did not show any substantial understatement of appellant's income for any one of the years in question.

(5) That appellee did not establish that the appellant did not keep adequate books and records.

(6) That the case at bar is not a proper case in which to apply the net worth theory as it did not clearly and accurately establish by competent evidence the net worth of the appellant for any one of the tax years in question nor did it produce evidence that excluded all possible source of taxable income from which any increase in net worth and the excess expenditures could have been derived.

SPECIFICATION OF ERRORS.

The appellant makes the following specification of errors and states the following points upon which he intends to rely on the appeal:

(1) That the trial Court erred in denying Appellant's motion for a judgment of acquittal made at the conclusion of Respondent's evidence;

(2) That the verdict of the jury was contrary to the weight of the evidence;

(3) That the verdict of the jury was not supported by substantial evidence;

(4) That the Court erred in denying the appellant's motion for a new trial;

(5) That the Court erred in overruling objections by appellant to questions addressed by respondent's attorneys to the witnesses Donald J. Thurman and Robert W. Davis, which questions related to extrajudicial admissions claimed to have been made by the appellant and which were asked and answered without any proof (other than such purported admissions) that a crime had been committed either before or after such questions were asked and answered.

QUESTIONS PRESENTED IN THIS CASE.

The first question presented in the case at bar is as to whether or not the appellee was entitled to rely upon the net worth theory. Secondly, assuming that appellee was entitled to rely upon said net worth theory was the evidence sufficient to establish that the appellant wilfully and knowingly attempted to evade a substantial portion of income tax due the appellee for the years 1944, 1945 and 1946.

STATEMENT OF FACTS.

The Government called as its first witness one John H. Reedy, Deputy Collector of Internal Revenue, First District of California (R. Tr. p. 28, lines 5-11). Mr. Reedy produced the original tax returns of appellant for the years 1943, 1944, 1945, 1946, 1947 and 1948. The 1943, 1944, 1945 and 1946 returns were introduced as appellee's Exhibits 1, 2, 3 and 4 (R. Tr. p. 21, lines 12-15).

The second witness called by the Government was one Jerry Robinson who testified that she ran a rooming house in Benicia during the years 1944-1946 and at times on the side a house of prostitution (R. Tr. p. 33, lines 8-12). Mrs. Robinson was asked if she had any financial transactions with the appellant during the years 1944-1946 and in reply to this question testified that she gave the appellant a Christmas present now and then but that it did not amount to very much (R. Tr. p. 33, lines 14-16). She further testified that she really did not know how much money she gave to the appellant during that period of time but that it might have been three or four hundred dollars. However, she further testified that she really didn't know how much she had given the appellant "because if I said I did I don't really remember. I may have given him \$50.00 at Christmas but I don't really know". (R. Tr. p. 33, lines 22-24.) Mrs. Robinson testified on cross-examination as follows:

"Mr. Seawell. Q. You stated, Mrs. Robinson, that you gave him a Christmas present or two, is that correct?

A. Yes, sir.

Q. And that is the only occasion upon which you recall giving him any money, is that correct?

A. Well, I don't really know, I may have given him a little present some other——" (R. Tr. p. 34, lines 19-25).

The witness was asked as to whether she could recall ever having given the appellant any money other than at Christmas time as a Christmas present and she testified that the only other present she recalled giving the appellant was on the occasion when she had had a lot to drink and the appellant told her to go home. She did not recall the amount of money that she gave him but testified "he was kind to me so I just gave him a little present" (R. Tr. p. 36, lines 7-12). The witness was asked how she had arrived at her estimate of having given the appellant presents in the sum of three hundred or so dollars during the years in question and she testified as follows in that regard:

"Mr. Seawell. Q. You have an estimate of giving him three hundred and some odd dollars. Now, how did you arrive at that figure?

A. Well, I don't know, I just arrived at it because I figure three Christmases would be 150, and then a little bit—I don't know; I said I don't know really.

Q. You don't really know how much you gave him, do you?

A. That is right, I don't really know how much." (R. Tr. p. 36, lines 12-19.)

"Mr. Seawell. Q. But you base your recollection on that fact that there were three Christ-

mases between 1944 and 1946 and you just imagined or assumed that you gave him \$50.00 each Christmas, is that correct?

A. Yes, sir.

Q. You have no independent recollection of doing that?

A. No, I don't." (R. Tr. p. 37, lines 2-8.)

The Government then called one Frank Bernardo, who is the manager of the Bank of America at Benicia and he produced the records of the bank setting forth the amount of money the appellant had on deposit with that bank. These records reflected that appellant had the following sums in his savings account:

December 31, 1943	\$504.08
1944	920.39
1945	929.61
1946	1090.05

and that the above figures included accrued interest (R. Tr. p. 39, lines 1-9). The witness further testified that the appellant also had a commercial account and that the balances were as follows:

December 31, 1943	\$635.60
1944	791.30
1945	1061.60
1946	847.42

(R. Tr. p. 39, lines 13-18.)

The witness also testified that the appellant purchased a cashier's check on December 7, 1945 in the sum of \$3,758.56 (R. Tr. p. 39, line 24 to p. 40, line 2).

The next witness called by the appellee was one Robert E. Arvedi, an officer of the main branch of the Bank of America at Vallejo, California. The witness testified that the appellant opened a savings account with that bank on the 15th day of July, 1946 and that the only deposit made to that account was the initial deposit in the sum of \$6,000.00 and that the balance in said account as of December 31, 1946 was \$6,000.00 (R. Tr. p. 40, line 23 to p. 42, line 8).

The next witness called by the appellee was a Mr. Gary Rees, manager of the Solano County Title Company (R. Tr. p. 42, line 23). He testified that his records showed that the appellant paid to his company the sum of \$3,758.66 on the 8th day of December, 1945; that this sum was received in the form of a cashier's check drawn on the Bank of America at Benicia (R. Tr. p. 43, lines 11-15).

The next witness called by appellee was a Mrs. Leonora F. Silveira (R. Tr. p. 45, line 1) who testified that she sold a house to appellant for \$4,913.00 in July of 1943 and that the appellant made monthly payments on said purchase in the sum of \$35.00 per month (R. Tr. p. 47, lines 11-20).

The next witness called by appellee was a Mrs. Mary Russold who testified that the appellant paid to her husband \$750.00 for the remodeling of certain property in the year 1945 (R. Tr. p. 48, lines 23-25) and \$400.00 in 1946 (R. Tr. p. 49, lines 1-4).

The next witness called by appellee was Genevieve Bennett who testified that she had a financial transaction with appellant either in the latter part of 1946

or the first part of 1947 (R. Tr. p. 51, lines 16-19). That the financial transaction involved the purchase of a house at 125 West J Street, Benicia, by the appellant for \$7,000.00 (R. Tr. p. 51, line 22 to page 52, line 1).

The next witness called by appellee was E. R. Tretheway, credit manager for the Earl C. Anthony Automobile Company, San Francisco (R. Tr. p. 56, line 7) whose records reflected that on May 31, 1944 a 1942 model four-door Packard sedan was sold to the City of Benicia for the sum of \$2,172.91 and that the car was delivered to the City of Benicia (R. Tr. p. 56, line 16 to p. 57, line 5). It also appears from his testimony that the car was paid for by the appellant but was to be used by appellant in his official capacity as Chief of Police of Benicia (R. Tr. p. 57, line 25 to p. 58, line 12).

Next the appellee called one Frank Coronado, automobile dealer of Vallejo, California who testified that appellant purchased a 1946 Packard Sedan, September 11, 1946 for \$2,611.11 and that he received in trade a 1942 Packard automobile for which he allowed appellant \$1,268.00 credit (R. Tr. p. 59, lines 18-24). However the witness further testified that he repurchased the automobile on April 20, 1948 for the sum of \$2,500.00 (R. Tr. p. 61, lines 4-7).

The next witness called by appellee was Anna G. Pine who testified that she was the City Clerk of the City of Benicia; that the City of Benicia paid the appellant \$40.00 per month plus gasoline and oil to be used by him in the operation of a Packard auto-

mobile; that the payments in the amount of \$40.00 started in September, 1946 and that prior thereto the city had paid all maintenance costs for the automobile (R. Tr. p. 65, lines 3-22).

The next witness called by appellee was Donald J. Thurman, special agent of the Bureau of Internal Revenue. Mr. Thurman's testimony was in regard to statements which he had taken from the appellant. His testimony was given over the objection of the appellant (R. Tr. p. 73, lines 1-25). Mr. Thurman testified that he first contacted the appellant on February 23, 1949; that he at that time questioned him in regard to his income tax returns for the years 1944, 1945 and 1946. The appellant advised Mr. Thurman that he had received a gift and/or inheritance about three years prior thereto in the sum of \$5,000.00; that this money was received in cash from his father and that this money had been left to appellant by his mother at the time of her death (R. Tr. p. 80, lines 3-8).

The agent further testified that appellant advised him that he had received a few gifts from one Jerry Robinson, these gifts consisting of \$50.00 a couple of times (R. Tr. p. 81, line 24 to p. 82, line 3).

The agent further testified that he received an affidavit from appellant, the same being dated the 5th day of May, 1949, which affidavit purports to state "1947 gift from mother \$5,000.00". It is also to be noted at this point that there is a line drawn through this statement of appellant. This document is Exhibit No. 8 and it is apparent from the document

that an attempt had been made to delete this statement from the affidavit (R. Tr. p. 85, line 25 to p. 87, line 8).

Mr. Thurman testified that he again interviewed the appellant on the 22nd day of July, 1949 (R. Tr. p. 87, lines 9-11) and in questioning him asked him if he would explain why he had omitted certain alleged income from his tax returns; that the appellant at that time stated "I figured they were just hand-outs, a sort of a gift, I didn't know I had to pay income taxes on them. I don't know too much about it." (R. Tr. p. 89, lines 11-16.)

The agent further testified that at the end of the interview on July 22, 1949 a Mr. Russold asked the appellant "You didn't report the full amount of your income; that is, you haven't declared the gratuities for fear of apprehension from local authorities." And then he asked him was it for the purpose of evading his income taxes, and Chief Davena replied, "Absolutely not." (R. Tr. p. 89, line 24 to p. 90, line 3.)

The agent further testified that at the time of his first interview with appellant he asked the appellant if he did not know that the payments that he had received were taxable and the appellant replied yes that he knew the amounts were taxable because there was so much information about it in the newspapers *nowadays*. (R. Tr. p. 90, lines 15-21.)

The agent testified that the appellant took him to the Bank of America and opened a safe deposit box which he, the appellant, had rented and in the agent's presence, and that he, the agent, made an inventory

of the items in the safe deposit box (R. Tr. p. 107, line 21 to p. 108, line 4); that the safe deposit box contained a marriage license of the appellant, a policy of title insurance on a home, five \$25.00 bonds, two \$100.00 bonds; that the bonds were in the name of the children of appellant; that there was nothing of an unusual nature in the safe deposit box (R. Tr. p. 108, line 21 to p. 109, line 19).

The agent further testified that appellant advised him that in the year 1947 he had reported \$800.00 as promotions on his income tax return and also advised him he was going to report approximately \$1,900.00 as promotional income which he had received in the year 1948 (R. Tr. p. 114, lines 15-20).

The agent also testified that the appellant advised him that he had a net worth of about \$5,300.00 when he was married in 1938 (R. Tr. p. 123, lines 8-18).

The agent also was asked the following question and gave the following answer:

“Q. Now, any place in your records, the notes that you took, or anything that you remember, at any time did Chief Davena in the conversation of February 23rd or the conversation of March 8, 1949, tell you that he had received any gifts from anyone other than the three \$50.00 gifts from Jerry Robinson prior to 1947?

A. No.” (R. Tr. p. 130, lines 13-19.)

The agent in referring to the real estate alleged to have been purchased and paid for by the appellant in the year 1946 for the sum of \$7,000.00 testified that the transaction in question might have taken place in

1947 rather than in 1946 and that if this were so that there would necessarily be a correction in the net worth of the appellant in the sum of \$7,000.00 (R. Tr. p. 141, lines 6-18). The agent further testified that of course it was possible that the appellant could have received the \$7,000.00 and/or \$7,150.00 which was paid on the property in 1947 by borrowing the money or in many other different ways (R. Tr. p. 142, lines 1-13).

The agent also testified that he received a letter from Harold M. Simon, attorney for appellant, some time after December 7, 1949 calling his attention to the fact that the appellant had made several errors in his statement to the agent and wished to correct them. The agent testified that after receiving said letter that he did not communicate with anyone in regard to the errors and did not make the corrections called to his attention (R. Tr. p. 153, line 21 to p. 154, line 3).

The next witness called by the appellee was Robert W. Davis, Deputy Collector of Internal Revenue, First District of California (R. Tr. p. 162, lines 11-17). He testified that he had a conversation with the appellant on or about the 24th day of October, 1949 (R. Tr. 163, lines 1-3); that at that time appellant stated that he wished to cooperate with the Department of Internal Revenue in any way possible and that he had done so up until that time. The agent testified that the appellant had cooperated with his department and that he, the appellant stated "he wanted to do what was right, and he stated that if

he had known these returns, these income tax returns, were strictly confidential, that he would have reported this outside income he had been receiving." (R. Tr. p. 164, lines 9-14.)

The agent further testified that he had made some investigation of the appellant's charge accounts in various stores in Oakland and Vallejo (R. Tr. p. 163, lines 4-25), but that he did not attempt to ascertain what indebtedness the appellant had in stores other than those referred to above.

The next witness called by the appellee was Augustus V. Brady, Technical Adviser with the Penal Division, the Chief Counsellor's office of the Bureau of Internal Revenue, San Francisco (R. Tr. p. 178, lines 18-24). He testified that he had made a number of computations at the request of the appellee; that these computations were based on hypothetical questions which were submitted to him by the appellee. The witness made a number of computations for both the appellant and appellee. One of the computations made for the appellee assumed that certain electric trains had a value of \$500.00 as of December 31, 1943. Another computation made for the appellant assumed that the trains had a value of \$1500.00 as of December 31, 1943 (R. Tr. p. 203, lines 7-23). The witness then at the request of the appellant computed the amount of tax which the appellant would owe for the years 1944, 1945 and 1946 assuming that he had filed a separate return and assuming that the trains in question had a value of \$1,500.00 as of December 31, 1943 and that appellant did not purchase a house

in 1946 for \$7,150.00 but rather purchased the house in the year 1947. The witness testified that the amount of tax due the appellee would have been \$485.00 for the year 1944; \$432.00 for the year 1945; and \$1,297.22 for the year 1946 (R. Tr. p. 225, line 13 to p. 226, line 8).

The agent was asked the following questions and gave the following answers in regard to the total deficiency of the appellant assuming he had filed a separate return:

“Mr. Maxwell. I will withdraw the question, Mr. Brady. Would the difference on a separate return basis be substantial?

A. There would be a deficiency in any event.

Q. There would be a deficiency in any event?

A. Yes.” (R. Tr. p. 229, lines 12-16.)

The witness further testified in regard to this subject as follows:

“Mr. Seawell. Q. And by a deficiency in any event you mean a dollar or two dollars, or what do you mean?

A. Well, no—I mean it would be a deficiency of, say, several hundred dollars.

Q. Well, it would be much lower than these figures on the blackboard he has just put on?

A. Well, they would be, yes.

Q. Well, let me have those figures.

A. Well, if I can just have—— (The witness computes figures.)

The Witness. O.K. For 1944, \$266.52.

Mr. Seawell. \$266 and how much?

A. Fifty-two cents.

Q. What is that?

A. That is the deficiency in tax, based on separate computation rather than joint computation.

Q. And you are using the figures in Government's Exhibit 9, is that correct?

A. That is correct.

Mr. Maxwell. Just a moment. You are using what figures?

A. I am using the figures before correction.

Mr. Maxwell. Before correction?

Mr. Seawell. You are using these totals here (indicating), aren't you?

A. Yes, \$23,000—before the corrections.

Q. Yes, that is right.

A. You want the rest of that answer, Mr. Seawell? 1945?

Q. Yes.

A. \$126.12. 1946, \$296.00.

Q. The total deficiencies for all the years involved in this case, then, would be \$688.64, is that correct?

A. I wouldn't say that. Based on the assumption you gave me, yes.

Q. Yes, based on the question, the hypothetical question, that is what you are testifying to as an expert, isn't that right?

A. Based on your hypothetical question.

Q. Now, let's get back to this. This includes some other person besides the defendant's tax, is that correct, or do you lead this jury to believe that is what the defendant would owe?

A. That would be the joint returns of husband and wife.

Q. That would be for both of them?

A. Yes.

Q. So he personally owed half of that?

A. Well, if they filed joint returns. They made an election to file that way. He would be liable jointly and severally for that tax.

Q. But the defendant in this case owed half of that? That would be his part of it, so to speak, would it not?

A. No, I think not. Community property is based—the husband has control of the community property. Wouldn't he be liable for the wife's liabilities?

Q. Under certain circumstances, and you can will—his Honor will tell you—upon the death of one you can will part of the property away and not the other part.

A. But I feel on the joint return that would be the amount of tax due and owing.

Q. But at any event these figures would be correct under the question presented to you, is that correct?

A. To the best of my ability." (R. Tr. p. 229, line 19 to p. 232, line 3.)

ARGUMENT.

From a reading of the testimony in its entirety in this case it can readily be seen that the appellee attempted to prove that the appellant failed to report all of his taxable income by what is known as the net worth theory. That is, the appellee attempted to establish the appellant's net worth as of December 31, 1943 and then to establish his net worth at the end of the years 1944, 1945 and 1946. Appellee then subtracted the total of appellant's net worth from the amount of income reported for the years in question

and thus attempted to arrive at his taxable income. The appellee did not take into account the fact that appellant had a net worth of some \$5,300.00 at the time of his marriage in 1938 nor did it take into account the fact that he had received a gift in the sum of \$5,000.00 from his mother, some three or four years prior to the start of the investigation of this case. The appellee in arriving at the net worth for the appellant has assumed the facts which were most detrimental to the appellant's position. For example, the appellee has attempted to reduce the net worth of the appellant by one thousand dollars by valuing the electric train in question in this case at \$500.00 whereas appellant had told it that they were worth some \$1,500.00 on December 31, 1943. Another example is the fact that the appellee in its computations disregarded the fact that the appellant had received a gift of \$5,000.00 from his mother. Assuming this to be true this would of course reduce the appellant's net worth so far as taxable income is concerned by that amount.

It will also be noted at this time that the appellee's original computations made by its agent, Mr. Brady, also assume that the appellant had paid some \$7,150.00 for his home and that said payment was made in the year 1946 whereas the evidence developed that the payment was not made until January 7 of 1947. This of course would again reduce the net worth of the defendant for the year 1946 by that amount. The original computation of Agent Brady made for the appellee was also based on the fact that the appellant

filed a joint return. It is to be noted that the testimony in this case established that the defendant was married during the years in question and that if he so desired he could have filed a separate return and that if he had done so and been given credit for the corrections which should have been made, his total tax due the appellee for the three years in question would have been \$344.32, that is it would have been one-half of the \$688.64 which agent Brady testified would have been the total deficiency for his wife and himself for the three years in question (R. Tr. p. 229, line 19 to p. 232, line 3). In other words the amount of the deficiency would certainly not have been substantial and therefore would not have supported a conviction in this case. It is well established that appellee must prove that a substantial portion of the tax which it alleges to be due the government was knowingly and wilfully defeated and evaded by the appellant.

Gleckman v. U.S., 85 Fed. (2d) 394;

Tinkoff v. U.S., 86 Fed. (2d) 868.

The only witness that the appellee called to testify that certain payments were made to the appellant that were not reported by the appellant was one Jerry Robinson. Her testimony was simply to the effect that she had given the appellant a Christmas present or two (R. Tr. p. 34, lines 19-25); that she had no independent recollection of the amount of money that she gave to the appellant as a present but she just imagined or assumed that she had given appellant approximately \$50.00 as a Christmas present in each

of the three years in question (R. Tr. p. 36, lines 12-19, p. 37, lines 2-8). Mrs. Robinson also testified that she might have given the appellant a small present on one occasion when she had been drinking and he had befriended her. It is from the testimony of this one witness that the appellee has tried to establish that the appellant received substantial amounts of income which he did not report during the years in question. A reading of the testimony of the witness Robinson in its entirety we submit would lead any reasonable person to the conclusions that she did not give any large or substantial sums to the appellant and secondly any sums that she gave to the appellant were given not for any particular service performed by the appellant but simply given in the nature of Christmas presents which were so small that she, as a matter of fact, had no independent recollection of the amounts she gave appellant. We submit that the appellee is attempting in this case to convict the appellant not because he had received any substantial income which he did not report but simply because he had received a Christmas present from a person who at one time was a prostitute.

We further submit that the testimony of the witness Robinson should be disregarded in its entirety as her testimony was contradictory throughout and for the further reason that she testified positively that she had no independent recollection of giving the appellant any sums of money (R. Tr. p. 37, lines 2-8).

The only testimony of any consequence against the appellant in this case was that of the Internal Revenue Agents, Thurman and Davis. This testimony was introduced over the objection of the appellant. We submit that the facts and circumstances surrounding the conviction of the appellant in this case fall squarely within the rule applying to net worth cases as set forth in the case of *U. S. v. Fenwick*, C.C.A. 7 Circuit, Nov. 4, 1949, 177 Fed. (2d) 488. In the *Fenwick* case one Helen J. Fenwick was convicted in the United States District Court, Southern District of Indiana, of income tax evasion for the years 1943 and 1944. At the trial the Government offered no evidence other than a "net worth-expenditures" balance sheet to show the evasion of income taxes. The Court says, pages 489 and 490:

"(1, 2) In such a situation we must keep in mind that the conviction can not stand unless there is proof of the corpus delicti, existence of which can not be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. *Pines v. United States*, 8 Cir., 123 F. 2d 825, 829; *Forte v. United States*, 69 App. D.C. 111, 94 F. 2d 236, 243, 127 A.L.R. 1120; *Gordiner v. United States*, 9 Cir., 261 F. 910, 912; *United States v. Chapman*, 7 Cir., 168 F. 2d 997 at page 1001. In the latter case we said: 'Appellant contends that, "In a 'net worth case,' the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to con-

vict.” We fully agree with his statement of the law.’ In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. *Gleckman v. United States*, 8 Cir., 80 F. 2d 394, 399; *United States v. Miro*, 2 Cir., 60 F. 2d 58, 61; *O’Brien v. United States*, 7 Cir., 51 F. 2d 193, 196. Inasmuch as there is no direct proof that defendant received income which he did not report, we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant’s implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt. Evidence of mere probability of guilt, of course, is not sufficient.”

The Court then proceeded to review the evidence in that case and showed that the Government’s information as to beginning net worth was based entirely upon an examination of defendant’s “cancelled checks, bank statements and miscellaneous memoranda”. The Court says, on pages 490 and 491:

“(3) The weakness of the government’s position, stressed by defendant, is the uncertainty of the propriety of the finding of defendant’s net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and

accurately established by competent evidence. *Bryan v. United States*, 5 Cir., 175 F. 2d 223; *United States v. Chapman*, 7 Cir., 168 F. 2d 997, 1001; *United States v. Skidmore*, 7 Cir., 123 F. 2d 604, 608. By this rule we must test the sufficiency of the evidence offered by the government to establish defendant's net worth at the beginning of 1943.

* * * * *

"* * * the evidence falls far short of proof that the property which the government agents assumed constituted all of defendant's net worth at the beginning of 1943, was in fact all of the property then owned by him. * * *

"(4) As we have said, when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived. Thus in *Bryan v. United States*, 5 Cir., 175 F. 2d 223, 225, the court said: 'The net worth expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate. Since * * * no claim of evasion is based upon the deductions from gross income reported by the Defendant, and since there is no evidence that the gross expenditures by the Defendant in any year were made entirely from gross income of the business operations in such year, it was essential for the Government to present evidence that excluded, or tended to ex-

clude, all other available sources from which the additional funds expended could have been derived. If the Defendant correctly reported his gross income, then a very substantial part of the expenditures was obliged to have been made from funds other than such current income and from sources not covered by the returns or the records of the Defendant or included by the Government's computation of net worth. * * * the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the Defendant took in * * *. The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the Defendant. * * * the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.' This supports the decision of this court in *United States v. Chapman*, 7 Cir., 168 F. 2d 997, 1001."

In this case, agent Brady proceeded to go right down the list of all assets and liabilities stated in his balance sheet, and excepting where the appellant had stipulated to facts, the figures were based wholly upon hearsay.

In *United States v. Fenwick* (C.C.A. 7th Ct., Nov. 4, 1949), 177 F. (2d) 488, discussed *supra*, the Court further said on page 492:

"Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evi-

dence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt."

It is also to be noted that the record in this case does not indicate that the appellee attempted to or did prove that the appellant's books were inadequate. The records disclose that the appellant kept all records that a man in his position, to-wit, chief of police, would ordinarily keep, that is his bank accounts and a record of any financial dealings which he might have entered into such as purchase of an automobile or a home. The Court instructed the jury in this regard as follows:

"The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the method of accounting regularly employed in keeping the books of

the taxpayer; but if no such method of accounting has been employed or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as, in the opinion of the Commissioner, does fairly reflect the income.

The Government is authorized by law, when the books are found to be inadequate, to adopt a reasonable method of ascertaining income. And so in this case it has undertaken to find out what the defendant was worth at the beginning of the year and what he was worth at the end of the year, so as to show what he had accumulated as income in the meantime.

If, at the end of the year, a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, unless he got it by gift or inheritance or loan, it would seem that he got it by earning it, and that it was part of his income.

Charge of the Court in *United States v. Flacomio*, D.D. Md."

We submit that the appellee did not establish that the books of the appellant were so inadequate that they were unable to determine his net income and for that reason the appellee was not entitled to rely upon the net worth theory. It is obvious that if the appellee had evidence to the effect that the appellant's income was substantially greater than that reported that it would have subpoenaed the records and all the persons who had contributed to his income. This it failed to do.

CONCLUSION.

We submit that there was no substantial evidence in the record in this case from which the Court or jury could find or infer that the appellant had received substantial income in excess of that which he reported in his income tax returns for the years 1944, 1945 and 1946. At the outside the testimony would establish that the appellant received Christmas presents which were of a minor nature. We submit that the appellee did not bring its case within the net worth theory for the reason that it did not produce evidence that excluded all possible available sources of taxable income from which the increased net worth and the excess expenditures (if any) could have been derived.

We again wish to call this Honorable Court's attention to the fact that when you exclude the testimony of Agents Thurman and Davis, which testimony should not have been allowed for the reasons heretofore stated, that there is not one scintilla of evidence produced by the appellee on which a jury might base a judgment of conviction.

We respectfully submit that the judgment of conviction should be reversed.

Dated, Sacramento, California,

February 13, 1952.

Respectfully submitted,

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